

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules for Market Tests of
Experimental Products

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Docket No. RM2013-5

PUBLIC REPRESENTATIVE'S COMMENTS
CONCERNING NOTICE AND ORDER OF PROPOSED RULEMAKING

(September 19, 2013)

On August 9, 2013, the Commission proposed new rules for market tests of experimental products.¹ Overall, the proposed rules are effective in clarifying the Commission's procedures in market test proceedings and increasing transparency concerning the Commission's application of 39 U.S.C. § 3641. However, some of the proposed rules could be improved with additional clarification and explanation. Thus, the Public Representative offers the following recommendations and suggestions for the Commission's consideration. In addition, the Public Representative has prepared two appendices, which have been filed with these comments. Appendix A contains many of the Public Representative's suggestions illustrated in legislative format. In addition to the suggestions included in these comments, Appendix A also offers minor technical clarifications and editorial suggestions for the Commission's consideration. Appendix B contains suggested changes to part 3020 and a suggested additional rule for inclusion in part 3035.

¹ Notice and Order of Proposed Rulemaking Establishing Rules for Market Tests of Experimental Products, August 9, 2013 (Order No. 1803).

I. General Recommendations

A. *Statutory Deadlines*

The proposed rules appear to require strict adherence to both the statutory deadlines established by 39 U.S.C. § 3641 and the additional deadlines set forth in the proposed rules. In several recent market test proceedings, the Postal Service requested an extension of a market test with less than the 60-day notice required by 39 U.S.C. § 3641(d)(2). In those cases, the Commission waived the statutory provision.² In Order No. 1781, the Commission stated “[g]oing forward, the Postal Service should not assume that a waiver will be granted absent exceptional circumstances.” Order No. 1781 at 3.

The proposed rules contain several strict deadlines for Postal Service filings. See e.g., Proposed Rules 3035.2, 3035.11(a), & 3035.16(e). The deadlines set forth in Proposed Rules 3035.2 and 3035.11(a) are statutorily set by 39 U.S.C. § 3641(c)(1) and (d)(2). If the Commission intends to enforce the statutory deadlines as mandatory, the Commission should explain its changed interpretation in the final rule.³ If the Commission plans to waive the deadlines in cases of exceptional circumstances, an additional rule would help to clarify the Commission’s position. A proposal for the additional rule is included in Appendix B.

B. *Resolving Ambiguities in Section 3641 and the Proposed Rules*

Section 3641 of title 39 contains several ambiguous terms, which the Commission has the authority to clarify in this rulemaking. It is in the interest of all future participants in market test proceedings to receive this clarification from the Commission so that there is better understanding of the several ambiguous terms used in the statute and proposed rules.⁴

² Docket No. MT2011-2, Order Granting Extension of Gift Card Market Test, July 19, 2013, at 3 (Order No.1781); Docket No. MT2009-1, Order No. 742, Order Granting in Part Temporary Extension of Collaborative Logistics Market Test, June 3, 2011, at 4-5.

³ Agencies are permitted to change their interpretations of statutory language, but such changes must be supported by “reasoned analysis” in order to be entitled to deference. See e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

⁴ It may also be in the Commission’s interest to clarify the ambiguous terms. The Supreme Court found that when a regulation “does little more than restate the terms of the statute itself”, “the near equivalence of the statute and regulation belies” the case for deference. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). The Court emphasized:

1. Market Disruption

Proposed Rule 3035.17 refers participants to the “definition” of market disruption in 39 U.S.C. § 3641(b)(2). The proposed rule thus suggests that a market disruption occurs when “[t]he introduction or continued offering of the product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns.” 39 U.S.C. § 3641(b)(2). However, Congress may have intended the opposite conclusion.

Section 3641(b) of the statute sets forth three tests that must be satisfied in order for an experimental product to be market tested. Paragraph (b)(2) outlines the test that must be satisfied to address market disruption concerns—that “. . . the product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer” *Id.* Therefore, a product causes market disruption if it does not satisfy paragraph (b)(2)’s test and thus creates an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer. Proposed Rule 3035.17 should be clarified to present a definition of market disruption rather than a reference to 39 U.S.C. § 3641(b)(2). Such a change would minimize likely confusion between the test set forth in the statute and the definition of market disruption.⁵

Within the statutory test for market disruption, the phrase “unfair or otherwise inappropriate competitive advantage” is ambiguous.⁶ Commission clarification of the phrase within its regulations would better explain the circumstances under which the Commission would consider limiting market test revenues from a particular geographic market in accordance with 39 U.S.C. § 3641(e)(1).

Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

Id.

⁵ This definition may be better placed in a part-specific definitions section as described in Section I.C. *infra*.

⁶ Section 3641(e)(2)(C) and Proposed Rule 3035.16(f)(1)(iii) contain a similar phrase—“unfair or otherwise inappropriate competition.” In its consideration of the phrase “unfair or otherwise inappropriate competitive advantage”, the Commission should also consider how any definition or explanation would clarify and/or be applicable to Proposed Rule 3035.16(f)(1)(iii).

The Commission recently analyzed a similar phrase used in 39 U.S.C. § 404a in another recent proposed rule.⁷ In that proceeding, the Commission stated that it anticipated using “precedent developed under federal statutes concerning unfair methods of competition” to clarify 39 U.S.C. § 404a(a)(1). Order No. 1739 at 7. Under 39 U.S.C. § 404a(a)(1), the Postal Service must show that its conduct “does not create an unfair competitive advantage.” *Id.* at 8. The Commission stated that this requirement is similar to the procompetitive justification that is offered in unfair methods of competition cases. *Id.* at 7-8. In those cases, “the procompetitive justification must be ‘a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.’”⁸ The Commission concluded that “[a]pplication of analogous precedent concerning claims of unfair competition will serve as useful guidance.” *Id.* Since the Commission took steps in Order No. 1739 to explain the concept of “unfair competitive advantage,” the Public Representative suggests that the Commission use its prior analysis to develop a clear definition of the phrase “unfair or otherwise inappropriate competitive advantage” and thus clarify the meaning of “market disruption” as used in the proposed rules.

2. Geographic Market

A definition of the term “geographic market” would clarify what the Postal Service must file under Proposed Rule 3035.3(b)(3)⁹ and the circumstances under which the Commission may exercise the authority granted to it by 39 U.S.C. § 3641(e)(1) as implemented in Proposed Rules 3035.17 and 3035.20(c).

In unfair methods of competition case law, “geographic market” is considered a term-of-art. It is defined in *Black’s Law Dictionary* and has been considered by federal courts in the context of statutes addressing unfair competition. According to *Black’s Law Dictionary*, a “geographic market” is “[t]he part of a relevant market that identifies the regions in which a firm might compete. If a firm can raise prices or cut production

⁷ Docket No. RM2013-4, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, June 5, 2013, at 3-8 (Order No. 1739).

⁸ *Id.* (citing *United States v. Microsoft Corp.*, 253 F.3d 58, 59 (D.C. Cir. 2001)).

⁹ Proposed Rule 3035.3(b)(3) requires that the Postal Service’s notice describe “the geographic market(s) where the market test may be conducted.”

without causing a quick influx of supply to the area from outside sources, that firm is operating in a distinct geographic market.”¹⁰ A “geographic market” under one federal statute “comprises the area in which [a business] effectively competes with other individuals or businesses for distribution of the relevant product. Stated differently, the relevant geographic market is defined as an area of effective competition or the locale in which consumers of a product or service can turn for alternative sources of supply.”¹¹ By taking the consumer perspective and looking at the area in which competition occurs, analysis focuses on the geographic area in which consumers can practically turn for alternative sources of a product.¹²

The Public Representative suggests that this approach inform clarification of the term “geographic market” in the proposed rules. By looking at the area in which a consumer is able to obtain an alternative supply of the market tested product, the Commission can then evaluate whether the market test may create an unfair or otherwise inappropriate competitive advantage and limit revenues in that market to abate anticompetitive behavior.

The Commission may also want to consider whether the relevant portion of 39 U.S.C. § 3641(e)(1) was intended to be applied solely to competitive products. Applying anticompetitive principles (designed to prevent monopolizing behavior) to market-dominant market tests may have unintended consequences. Because the concepts of “geographic market,” “unfair or otherwise inappropriate competitive advantage,” and “market disruption” all have roots in the law concerning unfair competition and all complement one another, the Commission should consider the terms both individually and jointly when clarifying the terms’ meanings within the proposed rules.

C. Definitions

The proposed rules place the definition of “small business concern” in 39 C.F.R. § 3001.5. The Public Representative suggests that, in the alternative, part 3035 have a separate definitions section, which would contain the definition of “small business

¹⁰ *Black’s Law Dictionary* (9th ed. 2009).

¹¹ 54 Am. Jur. 2d *Monopolies and Restraints of Trade* § 60 (2013) (citing *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910 (8th Cir. 1976), *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005)).

¹² 58 C.J.S. *Monopolies* § 45 (2013).

concern” and other definitions relevant to the part. Several of the Commission’s parts contain part-specific definition sections; this appears to be particularly useful when the part has unique terminology associated with it. See, e.g., 39 C.F.R. §§ 3003.2, 3005.2, 3007.1, 3025.1, and 3050.1. From a structural standpoint as well, the definition of “small business concern” may be poorly suited for 39 C.F.R. § 3001.5, as all of the definitions currently in that rule consist of a single paragraph while the definition of “small business concern” has a more complex structure.

To further clarify the part 3035 rules, the Public Representative suggests the following terms be included in a part-specific definitions section: \$10 Million Adjusted Limitation, \$50 Million Adjusted Limitation, CPI-U index, experimental product, geographic market, market disruption, market test, small business concern, unfair or otherwise inappropriate competition, and unfair or otherwise inappropriate competitive advantage.

Defining “\$10 Million Adjusted Limitation” and “\$50 Million Adjusted Limitation” would bring additional clarity to the proposed rules. Currently, the terms are defined in Proposed Rules 3035.15(a) and 3035.16(a). Since the term “\$10 Million Adjusted Limitation” is used throughout part 3035, defining the term in a part-specific definitions section would clarify its use in Proposed Rules 3035.15, 3035.17, and 3035.18. The term “market test” is used in almost every proposed rule. On a few occasions, including the title of part, it is written “market tests of experimental products.” See Proposed Rule 3035.1. In addition, “experimental product” is used in Proposed Rules 3035.15, 3035.16, and 3035.18. The Commission may also want to use the definitions section to explain the relationship between the terms “market test” and “experimental product”—the definitions of which would better clarify the scope of 39 U.S.C. § 3641 and the new part 3035.¹³

The Public Representative recognizes that the definition of “small business concern” as applied to part 3035 is also relevant to 39 C.F.R. §§ 3020.32(h) and 3020.52(h). See 39 U.S.C. § 3642(b)(3)(C). Therefore, the Commission may consider an amendment to 39 C.F.R. §§ 3020.32(h) and 3020.52(h) in the final rule, which would

¹³ A discussion of the other terms that may benefit from inclusion in a part-specific definitions section is included in Section I.B *supra* and Section II.F *infra*.

add a cross-reference to the definition of “small business concern” in part 3035. The suggested revisions to part 3020 appear in Appendix B.

II. Rule-Specific Recommendations

A. *Proposed Rule 3035.3*

Paragraph (a)(1) of Proposed Rule 3035.3 proposes that the Postal Service’s notice of a market test “[d]escribe . . . how the experimental product is significantly different from all products offered . . . within the 2 fiscal years preceding the start of the market test.” In Order No. 1803, the Commission clarified that the statutory language implemented in Proposed Rule 3035.3 “refers to the two fiscal years preceding the start of the market test.” Order No. 1803 at 4. The rule, as written, removes a relevant set of products from the Commission’s analysis because it excludes any products offered during the same fiscal year as the market test. In accordance with Proposed Rule 3035.3, the Postal Service would only consider products it has offered during “the two fiscal years preceding the start of the market test.” Thus, for a market test beginning in FY 2014, only FY 2012 and FY 2013 products would be considered—even if a substantially similar product was offered in FY 2014. This gap could result in a market test offering a product substantially similar to a current product offering. The Public Representative suggests this result could be avoided by looking at the previous eight fiscal quarters. This suggestion is illustrated in Appendix A.

Paragraph (a)(2) of Proposed Rule 3035.3 calls on the Postal Service to “[e]stablish that . . . the experimental product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns.” The Commission provided guidance in Order No. 1803 concerning how the Postal Service can provide information sufficient to comply with paragraph (a)(2) of the proposed rule. Order No. 1803 at 13. The guidance sets forth three distinct analytic steps, which specifically identify the impact of the market test on small business concerns. *Id.* The Public Representative supports these analytic steps, but believes additional analysis is necessary to assess whether the market test creates “an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer.” In 39 U.S.C. § 3641(b)(2), the Public Representative suggests Congress may have had two primary concerns in mind: (1) the market test does not

create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer; and (2) the assessment in (1) is conducted with particular consideration of small business concerns. The Commission's guidance in Order No. 1803 appears to focus on assessing item (2)—rather than consideration of (1) and (2) together.

Expanding the required analysis to include (1) and incorporating the required analysis into the rule would better clarify the Commission's expectations and understanding of 39 U.S.C. § 3641(b)(2). These suggestions are illustrated in Appendix A.

Paragraph (b)(1) of the proposed rule requires that the "description of the nature and the scope of the market test" demonstrate "why the market test is not inconsistent with the requirements of 39 U.S.C. 3641." On its face, the proposed rule requires the Postal Service to prove a negative, and Order No. 1803 does not provide additional guidance how the Postal Service can make the necessary demonstration. The Public Representative suggests that paragraph (b)(1) in the final rule require a certified statement, similar to the certified statement required by 39 C.F.R. § 3015.3(c)(2). This suggestion is included in Appendix A.

B. *Proposed Rule 3035.6*

As written, Proposed Rule 3035.6 limits the ability of the Commission to assess continued compliance with 39 U.S.C. § 3641. By conducting an after-the-fact review of changes to a market test and by giving the Postal Service discretion to determine the materiality of any change (except adjustments to prices, geographic scope, or termination date), the rule, as written, could result in changes affecting compliance with the statute occurring without the Commission's knowledge.

The Public Representative suggests revisions to Proposed Rule 3035.6 that would allow for the Commission to determine the materiality of changes prior to the adoption of any change.¹⁴ Acknowledging the need for flexibility in on-going market tests, the Public Representative recognizes that an after-the-fact review of a change may be necessary in certain circumstances. The Public Representative's suggestion provides for that exception. The Public Representative's suggested revisions also

¹⁴ Order No. 1803 states that "[t]he Postal Service must keep the Commission apprised of any changes to the market test to ensure continued consistency with the requirements of 39 U.S.C. 3641." Order No. 1803 at 6. However, the Commission later limits the notification requirement to "material changes." *Id.* at 6, 21.

include clarification that notices should be filed in the proceeding's docket, as well as clarification of the Commission's actions taken upon receipt of a notice of a change to a market test. These suggestions are included in Appendix A.

C. *Proposed Rule 3035.10*

Proposed Rule 3035.10 raises a question as to what condition(s) must be met in order for a market test to be extended. While it is factually true that a market test may not exceed 24 months unless the Postal Service requests an extension, the extension request is neither the sole nor the most important condition that must be fulfilled in order for a market test to exceed 24 months. As currently written, Proposed Rule 3035.10 could be read to automatically extend a market test upon the filing of an extension request by the Postal Service. The rule could be clarified if written: "A market test may not exceed 24 months in duration unless the Commission makes the finding that the extension is consistent with the requirements of 39 U.S.C. 3641 in accordance with § 3035.11(c) of this part." This suggestion is included in Appendix A.

D. *Proposed Rule 3035.11*

The Public Representative suggests two changes to paragraph (b) of Proposed Rule 3035.11. First, the Public Representative suggests that the request for an extension include an explanation of what information or data the Postal Service currently lacks to assess the feasibility or desirability of the experimental product and how the extension will provide the missing information. The Postal Service should include any changes to its data collection plan that will facilitate the collection of any necessary data or information. In addition, the Public Representative suggests that the Postal Service include supporting documentation for the calculations currently required by paragraph (b)(3). These suggestions are included in Appendix A.

E. *Proposed Rule 3035.12*

Section 3641(f) of title 39 gives the Commission the authority to terminate a market test (or take such other action it considers appropriate) if the market test fails to meet one or more of the requirements of 39 U.S.C. § 3641. Determinations made under that authority "shall be made in accordance with such procedures as the

Commission shall by regulation prescribe.” 39 U.S.C. § 3641(f). Paragraph (b) of Proposed Rule 3035.12 sets forth those procedures.

As written, paragraph (b) raises questions concerning how and under what circumstances the Commission will use its 39 U.S.C. § 3641(f) authority. Proposed Rule 3035.12(b) does not describe the circumstances under which “the Commission may direct the Postal Service to demonstrate that the market test continues to meet the requirements of 39 U.S.C. 3641 and the Commission’s rules.” Nor does it explain how the Postal Service should “demonstrate that the market test continues to meet the requirements of 39 U.S.C. 3641” or what analysis the Commission will undertake after the Postal Service makes a demonstration of compliance. The rule does not explain what criteria the Commission will use to assess whether to allow public comment nor does it explain whether public comment will precede or follow the Postal Service’s demonstration of compliance.

In order to clarify how the Commission intends for paragraph (b) of the proposed rule to work, the Commission should consider: (1) if the Commission will act *sua sponte* (and under what circumstances) or at the request of any party (and under what circumstances); (2) if the Commission will order a demonstration of compliance with 39 U.S.C. § 3641 and the Commission’s regulations in their entirety or require the Postal Service to demonstrate compliance vis-à-vis particular provisions of concern in light of the facts at issue; (3) if comments will be considered before the Commission requests a demonstration of compliance, after the Commission requests a demonstration of compliance, or after the Postal Service files its demonstration of compliance; and (4) the form the Commission expects the Postal Service’s demonstration of compliance to take (e.g., affidavits, certified statements, responses to Commission Information Requests). By providing more information about the circumstances under which the Commission may use its 39 U.S.C. § 3641(f) authority and the process by which the market test will be evaluated, all interested parties will have clearer expectations and a better understanding of how the Commission understands and plans to use its 39 U.S.C. § 3641(f) authority. Suggested revisions to paragraph (b) are included in Appendix A.

F. *Proposed Rule 3035.15*

Proposed Rule 3035.15 states in paragraph (b) that “[t]he Consumer Price Index, as specified in 39 CFR 3010.21(a) and 3010.22(a), is applicable for calculations under this part.” The referenced part 3010 rules discuss “calculation of the annual limitation” and “calculation of less than the annual limitation.” Paragraph (a) of 39 C.F.R. § 3010.21 states that the CPI-U is used to calculate the annual limitation. If the Commission intended for paragraph (b) of Proposed Rule 3035.15 to state that the Consumer Price Index to be used for calculations is the CPI-U index, then stating that the CPI-U is the relevant index would clarify the rule. If some other relationship to 39 C.F.R. §§ 3010.21 and 3010.22 was intended, paragraph (b) should be clarified to explain the Commission’s intent. A suggested change to paragraph (b) is included in Appendix A.

Changes to paragraph (b) or the addition of a part-specific definitions section may clarify the introduction of the term “CPI-U index” in paragraph (d). As written, the term “CPI-U index” appears suddenly without any explanation or definition. While those who practice regularly before the Commission are likely familiar with the applicability of the CPI-U index, the term “CPI-U index” should be defined for those who may be less familiar with economic terminology or Commission practice.

Neither 39 U.S.C. § 3641(g) nor Proposed Rule 3035.15 consider how the \$10 Million Adjusted Limitation would be adjusted during a deflationary period. The statutory provision is ambiguous—by first stating it is an “[a]djustment for inflation” and then stating it “shall be adjusted by the change in the Consumer Price Index . . . (as determined under regulations of the Commission).” Paragraphs (c) and (d) of Proposed Rule 3035.15 appear to call for reductions to the \$10 Million Adjusted Limitation during deflationary periods. The Commission should revise the proposed rule if it intends to adjust the \$10 Million Adjusted Limitation solely for inflation.

G. *Proposed Rule 3035.16*

Paragraph (f) of Proposed Rule 3035.16 outlines the information that must be contained in a request for exemption from the \$10 Million Adjusted Limitation. The proposed rule requires that the request explain how the experimental product will “not result in unfair or otherwise inappropriate competition.” Without further clarification from

the Commission on the meaning of “unfair or otherwise inappropriate competition” and the criteria that the Postal Service should use to demonstrate that the experimental product does “not result in unfair or otherwise inappropriate competition,” it is unclear what information the exemption request must contain to fulfill the requirements of paragraph (f)(1)(iii). The Public Representative’s discussion in Section I.B.1 *supra* may assist in framing any analysis.

Paragraphs (f)(2) and (f)(3) discuss the revenue figures that the Postal Service must provide with its request for exemption from the \$10 Million Adjusted Limitation. Paragraph (f)(2) requires that the Postal Service calculate the total revenue received from the market test for each fiscal year the market test has been in effect. Paragraph (f)(2) is problematic because it requests revenue on a fiscal year rather than fiscal quarter basis. If the market test has been in operation less than one full fiscal year at the time an exemption is requested, the total revenue received from the market test remains relevant to the Commission’s analysis but would not be required under the proposed rule. Since Proposed Rule 3035.20(a) requires revenue data to be generated on a quarterly basis, revising paragraph (f)(2) to require revenue data for each quarter the market test has been in effect should not create any hardship. This suggestion is included in Appendix A.¹⁵

Paragraph (f)(3) requires that the Postal Service estimate the anticipated revenue “for each fiscal year prior to the conclusion of the extension period of the market test.” As discussed above, requiring revenue on a quarterly basis gives the Commission more complete information. In addition, the wording of paragraph (f)(3) should be clarified to explain what is meant by “prior to the conclusion of the extension period of the market test.”¹⁶ The Public Representative’s suggested clarifications are included in Appendix A.

H. *Proposed Rule 3035.17*

Proposed Rule 3035.17 contains several ambiguous terms critical to the rule’s meaning. As discussed previously, “geographic market” and “market disruption” should be clarified. See Section I.B *supra*. In addition, Proposed Rule 3035.17 should provide

¹⁵ Appendix A also contains a similar change to Proposed Rule 3035.11(b)(3) and (4).

¹⁶ Proposed Rule 3035.11(b)(4) contains identical language. A suggested revision to that rule is included in Appendix A.

additional information concerning the circumstances under which the Commission plans to exercise its 39 U.S.C. § 3641(e)(1) authority. The proposed rule, as written, does not explain: (1) the circumstances under which the Commission will consider limiting revenues from particular geographic markets; (2) the procedures the Commission will use to determine if revenues from particular geographic markets should be limited (including whether the Commission will notice its consideration of the issue, provide an opportunity for public comment, and provide the Postal Service an opportunity to state a view); and (3) the criteria by which the Commission will assess whether to limit revenues from particular geographic markets. Without this information, future participants in market test proceedings are left without clarity concerning how and when the Commission plans to exercise its 39 U.S.C. § 3641(e)(1) authority.

I. *Proposed Rule 3035.18*

Proposed Rule 3035.18 contemplates the process by which the Postal Service would make an experimental product permanent. The rule contemplates the Postal Service filing a notice pursuant to 39 C.F.R. § 3020.30 to facilitate the change. Commission rule 3020.30 governs proposed modifications of the market dominant or competitive product lists. The rule defines modifications as “adding a product to a list, removing a product from a list, or moving a product from one list to another.” 39 C.F.R. § 3020.30. However, in order for a product to be tested in a market test, 39 U.S.C. § 3641(b)(3) requires that the product is identified “as either market-dominant or competitive, consistent with the criteria [of 39 U.S.C. § 3642(b)(1)].” As part of current practice, market tested products are added to the applicable product list.¹⁷ Therefore, the definition of modifications in 39 C.F.R. § 3020.30 should be amended to include changing an experimental product to a permanent offering. This suggestion is included in Appendix B.

Although experimental products are categorized as either market-dominant or competitive, experimental products are not “subject to the requirements of sections 3622, 3633, or 3642, or regulations promulgated under those sections.” 39 U.S.C. § 3641(a)(2). However, when the experimental product is evaluated for permanent

¹⁷ See Mail Classification Schedule, available at <http://www.prc.gov/prc-pages/library/mail-classification-schedule/default.aspx?view=mail>.

status, compliance with applicable statutory and regulatory provisions should be a key consideration.

For example, when a market test of a competitive experimental product is evaluated, it is evaluated for consistency with 39 U.S.C. § 3641, not 39 U.S.C. § 3633. The Commission does not consider whether the proposed test covers its attributable costs or contributes to overall institutional costs. Once the Postal Service seeks to make the product permanent, the Commission must consider the product's compliance with 39 U.S.C. § 3633, which it would generally do through its 39 C.F.R. part 3015 regulations. However, the current part 3015 regulations apply only to changes in rates for products of general applicability and new or changed rates for products not of general applicability. See 39 C.F.R. §§ 3015.2, 3015.3, and 3015.5. The Public Representative suggests that the Commission make changes to part 3015 and/or Proposed Rule 3035.18 to ensure that the rates for any competitive experimental product under consideration for permanent status are evaluated for compliance with 39 U.S.C. § 3633.¹⁸

Similarly, the Public Representative suggests that Proposed Rule 3035.18 clarify whether a market-dominant experimental product being considered for permanent status is a "new" market-dominant product for the purpose of the Commission's rate and volume analysis under 39 C.F.R. part 3010. This determination would clarify potential price cap implications and would provide additional insight concerning the process by which a market-dominant experimental product would be made permanent.

In addition, the Public Representative suggests that when the Postal Service seeks to make an experimental product permanent, the Postal Service file a notice of application for permanent status in the market test proceeding's docket. The notice should include the docket number(s) for the related proceeding. In the case of the two experimental products that became permanent, such a notice in Docket Nos. MT2010-1

¹⁸ The suggestion is representative of past practice. The Samples Co-Op Box market test is the only competitive market test that has become a permanent product. In Docket Nos. MC2011-16 and CP2011-53, the Commission approved the Postal Service's request after evaluating the product for compliance with 39 U.S.C. § 3633 and the Commission's part 3015 regulations. Docket Nos. MC2011-16 and CP2011-53, Order No. 686, Order Approving Parcel Select Contract 1 Negotiated Service Agreement, March 1, 2011, at 5-7. Part 3015 did not pose a problem in Docket No. CP2011-53 because the Postal Service was adding a product not of general applicability—which fell cleanly within the scope of 39 C.F.R. § 3015.5.

and MT2011-3 would have allowed interested persons to better trace the progression of each market test. This suggestion is included in Appendix A.

Finally, the Public Representative suggests that the Commission change the deadline for the request from “sufficiently in advance so that the market test does not exceed the \$10 Million Adjusted Limitation or any authorized adjusted limitation” to a more finite deadline. The Public Representative suggests 45 days in Appendix A.¹⁹ The Public Representative also suggests that tying the deadline to the date on which the \$10 Million Adjusted Limitation (or other authorized limitation) would be exceeded is too limiting on the Postal Service. The Postal Service may want to make a product permanent for reasons other than reaching the authorized limitation. Tying the deadline to the date on which the Postal Service wants the product to become permanent would provide additional flexibility. This suggestion is included in Appendix A.

J. *Proposed Rule 3035.20*

Paragraph (a) of Proposed Rule 3035.20 and Proposed Rule 3035.3(b)(6) do not clearly distinguish between the requirements for the data collection plan and the data collection reports. Proposed Rule 3035.3(b)(6) requires that the initial notice of the market test include “a plan for monitoring the performance of the market test, including a description of the specific data items to be collected, as required by 39 CFR 3035.20.” Proposed Rule 3035.20(a) mentions the description of the data collection plan to be included in the initial notice—stating that it includes “plans to collect volume, revenue, and other data.” The remainder of paragraph (a) of Proposed Rule 3035.20 prescribes the contents of “data collection reports”—which at a minimum include revenue, attributable costs, and start up-costs (and do not include the volume data that must be included in the plan). Data collection reports are not discussed again until paragraph (d), which contains a quarterly filing requirement for the reports. As written, the distinction between the contents of the data collection “plan” and the data collection “reports” is unclear. Using Proposed Rule 3035.3 to set forth the expectations for the notice (and required data collection plan) and Proposed Rule 3035.20 to set forth the

¹⁹ The Public Representative does not have a strong opinion on the length of time required for review, only that the deadline be more concrete. She selected 45 days because the same deadline was used in Proposed Rule 3035.16(e) which the Commission states is “sufficient time to consider the request.” Order No. 1803 at 8.

requirements for the data collection reports should alleviate any confusion. In addition, reordering the paragraphs in Proposed Rule 3035.20 (or dividing the proposed rule into two rules) will help distinguish between data collection reports and other reporting requirements for market tests. Suggested revisions to Proposed Rule 3035.20 (and related revisions to Proposed Rule 3035.3) are included in Appendix A.

Paragraph (c) of Proposed Rule 3035.20 would benefit from additional specificity. As discussed in Section I.B.2 *supra*, defining “geographic market” would clarify expectations in this rule and Proposed Rule 3035.17. In addition, since both Proposed Rule 3035.20(c) and Proposed Rule 3035.17 relate to the Commission’s 39 U.S.C. § 3641(e)(1) authority, it would enhance overall clarity to add the circumstances under which the Commission would require revenue data from specific geographic markets within the overall procedures of a modified rule 3035.17. See Section II.H *supra*.

Respectfully submitted,

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